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No. 91-655

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1991

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

- vs -

DONALD WATKINS,
CHRISTIAN PHILLIPS,
MICHAEL HUNTER,

Respondents.

BRIEF FOR RESPONDENT HUNTER
IN OPPOSITION TO PEOPLE OF THE STATE OF MICHIGAN
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN

GERALD M. LORENCE

Counsel of Record

1750 Penobscot Building
Detroit, Michigan 48226
(313) 961-9055

Attorney for Respondent Hunter

COUNTER-STATEMENT OF QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI WHEN THE CONSISTENT PRECEDENTS SET BY THIS COURT IN *IDAHO v. WRIGHT*, *LEE v. ILLINOIS*, *CRUZ v. NEW YORK*, AND *RICHARDSON v. MARSH* MAKE CLEAR THE CONSTITUTIONAL REQUIREMENTS FOR WHEN THE CONFRONTATION CLAUSE YIELDS TO A HEARSAY EXCEPTION, PARTICULARLY WHEN IT PERMITS A NONTESTIFYING CO-DEFENDANT'S UNREDACTED CONFESSION WHICH INCRIMINATES THE ACCUSED TO BE ADMITTED AS SUBSTANTIVE EVIDENCE AGAINST THE ACCUSED?

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NOW COMES Respondent herein, MICHAEL HUNTER, by his attorney, GERALD M. LORENCE, and prays that the Petition for a Writ of Certiorari to the Supreme Court of Michigan filed by the People of the State of Michigan be denied for the reasons herein stated:

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 178 Mich App 439; 442 NW 2d 201 (1989) and is appended as Appendix A to the People's Petition for a Writ of Certiorari. The opinion of the Michigan Supreme Court is unreported at this time and is appended as Appendix B to the People's Petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered July 17, 1989. The judgment of the Michigan Supreme Court was entered September 19, 1991. The jurisdiction of this Court is invoked under 28 USC § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The majority below stated: "Although we generally adopt the statement of facts in the dissent, . . . , we find it necessary to revisit the crucial, disputed co-defendant confessions by Kerry Jordan and Walter Miller. The complete text of those statements is set forth in appendices to the dissent. Even a casual reading of the confessions leads to the unavoidable conclusion that they contain precisely the kind of inherently suspect and unreliable accusatory hearsay which has historically concerned courts and commentators.

Co-defendant Jordan said it all when he responded to the interrogator's question, 'Why are you telling me [this statement]', by saying: '*Because I'm not going to take the fall alone.*'" (Emphasis in the original)

Five defendants in this matter were tried jointly, Watkins, Jordan, Phillips, Miller and Mr. Hunter. At trial, over defense counsel's objections, the prosecution was allowed to introduce into evidence the unredacted confessions of defendants Jordan and Miller as substantive evidence against all of the defendants. None of the defendants testified at trial. Furthermore, these confessions were read to the jury in unredacted form. The trial court instructed the jury on the use of the statements:

"The prosecutor also has admitted into evidence the statements made by two of the defendants. Consider the facts and circumstances surrounding the making of the statements, along with the other evidence in this case in judging the truthfulness and in deciding how much weight, if any, you believe the statement deserves."

All five of the defendants were convicted and all appealed. The appeals were consolidated.

In a published opinion, *People v. Watkins*, 178 Mich App 439 (1989), the Court of Appeals held that the confessions of Jordan and Miller were properly admitted by the trial court as substantive evidence against all the defendants. The Court stated:

"Jordan's and Miller's confessions were corroborated by the testimony of Payne and Wilbert. Police officers testified that they counted nineteen bullet holes in Wilbert's car and recovered twenty-three fired cartridge cases from the scene of the shooting. An expert in firearms and

firearms identification testified that, based on his analysis of the cases and the bullets that were recovered from Johnson's body, at least three guns were used in the shooting.

"Jordan's and Miller's confessions were identical in all material respects. The record does not indicate that they distorted the facts for their own benefit or to the detriment of their codefendants. They did not attempt to exonerate themselves. The record indicates that they accurately described the kidnapping and shooting. Their confessions were corroborated by evidence which was properly admitted against defendants at their trial. Therefore, we conclude that Jordan's and Miller's confessions bore sufficient indicia of reliability to overcome the presumption against their admission into evidence. The lower court properly admitted the confessions as substantive evidence against defendants. We recognize that this issue presents a close question. Therefore, we further conclude that in the context of this case, any Confrontation Clause violation which occurred was harmless." *Watkins, supra*, at 446-447.

The Michigan Supreme Court granted leave to appeal to determine whether the trial court erred in permitting the prosecution to introduce, as substantive evidence at the defendants' joint trial, incriminating statements of two nontestifying codefendants and, if so, whether the error was harmless. A majority of four justices found that the statements did not meet the criteria to overcome the confrontation clause and found that the Respondents' Sixth Amendment rights to confrontation were violated by the admission, as substantive evidence, of the unredacted statements.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

Respondent Hunter, defendant below, submits that the issue presented in the People's Petition was correctly decided by the Michigan Supreme Court in a manner consistent with and based on precedent of the applicable decisions of this Court. Therefore, under Supreme Court Rule 16.01, this Court should decline to hear this matter.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. Const, Am VI. The Michigan Constitution similarly provides for this right, Const. 1963, art. 1, § 20.

Relying on this Sixth Amendment right of confrontation, this Court has subjected hearsay statements in a co-defendants confessions, introduced to inculcate the accused, to highest and most searching scrutiny. In *Douglas v. Alabama*, 380 U.S. 415; 85 S Ct 1074; 13 L Ed 2d 934 (1965), the Court held that the Sixth Amendment was violated even though the co-defendants' confession containing the hearsay statements was not admitted as substantive evidence but read to the accused as he remained mute on the stand, claiming his Fifth Amendment privilege against self-incrimination, ostensibly to refresh his memory. The Court rejected that subterfuge and held that the accused was denied the right to confront and cross-examine his co-defendant accuser. *Douglas* at 419-420.

The main and essential purpose of the right of the accused to confront the witnesses against him is to secure the opportunity of cross-examination. *Pointer v. Texas*, 380 U.S. 400; 13 L Ed 2d 923; 85 S Ct 1065 (1965).

This essential purpose was more than evident in *Bruton v. United States*, 391 U.S. 123; 20 L Ed 2d 476; 88 S Ct 1620 (1968).

In *Bruton*, the Court held that the dangers presented by a hearsay co-defendant confessions to the accused's right of confrontation is so extreme that cautionary instructions to the jury regarding consideration of such evidence in joint trials must be deemed ineffective and constitutionally insufficient. The Court stated: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side by side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested on cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." *Bruton*, at 135-136.

In the instant matter, the decision of the trial court to allow the unredacted confessions of two non-testifying co-defendants as substantive incriminating evidence against the Respondents and the Court of Appeals affirmation are a clear violation of Respondents' Sixth Amendment right to confront witnesses against them and the Federal precedent established by *Bruton* and its progeny.

In *Lee v. Illinois*, 476 U.S. 530; 90 L Ed 2d 514; 106 S Ct 2056 (1986), the Supreme Court held that even where both defendants confessed, a co-defendant's statement taken after he was told that the defendant had already implicated him, was presumptively unreliable when neither defendant testified. There was not a sufficient indicia of reliability, flowing from either the circumstances in the confession taking process or in the fact that there is some "interlocking" of the statements as to context, to overcome the presumption against admission of this evidence. The Court in *Lee*, unmistakably "reject[ed] [the state's] categorization of the hearsay [co-defendant confession] involved . . . as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Lee*, 476 U.S. at 544, n.5. Thus, the Court in *Lee* apparently believed that the statement against interest exception "defines too large a class" because, while the exception might confer presumptive liability on most types of hearsay in most cases, it does not, without more, suffice to cure the especially suspect and uniquely unreliable nature of accusatory hearsay statements in co-defendant confessions.

In *Richardson v. Marsh*, 481 U.S. 200; 95 L Ed 2d 176; 107 S Ct 1702 (1987), the Court held that a "non-testifying co-defendant's confession is admissible against a defendant who testified, *when the confession is redacted to eliminate all references to the name and existence of the defendant, the confession is not incriminating on its face, and becomes linked to the defendant by evidence properly introduced against him.*" (emphasis added) In a companion case to *Marsh*, *Cruz v. New York*, 481 U.S. 186; 95 L Ed 2d 162; 107 S Ct 1714 (1987) the Court held that where a non-testifying co-defendant's confession incriminating

defendants is not directly admissible against defendant, i.e., *Lee, supra*, the confession cannot be admitted at their joint trial even if the jury is instructed not to consider it against the defendant and even if defendant's own confession is admitted against him. The Court also held that the non-testifying co-defendant's confession was sufficient 'indicia of reliability' to be directly admissible against defendant, despite lack of opportunity for cross-examination, 107 S Ct at 1719.

In the instant matter, there are five defendants, none of whom testify. Other than the co-defendants' confessions, the only testimony directly linking the Respondent Hunter to the crime is Bernard Payne's testimony. This witness gave two statements to police, deliberately failing to refer to Hunter until he was told that Hunter was "locked up" (Tr 7-21-87 at 467-469). Respondent Hunter never gave a confession nor did he testify, so there is no "linkage" situation, as between defendants as envisioned in *Cruz, supra*. Furthermore, Mr. Payne's two statements were inconsistent with each other. The co-defendant's confessions corroborate the second statement given by Mr. Payne, which implicated the Respondent Hunter. Mr. Hunter had no means of attacking these statements short of taking the stand and the prejudice to him in such a situation is apparent.

In arguing that the incriminating statements of two non-testifying co-defendants can come in as substantive evidence against other defendants, the prosecutor argued that since these statements were against the penal interest of the declarant and considered an exception to the Hearsay Rule under MRE 804(b)(3), then they can be admitted as substantive evidence against Mr. Hunter. The Court of Appeals relied on this reasoning to affirm the admission of the statements and the convictions. While recognizing that "the United

States Supreme Court stated that the declaration against penal interest concept defines too large a class for meaningful Confrontation Clause analysis" [citing *Lee, supra*, 476 at 544 n5], the Court of Appeals nonetheless held that "The *Bruton* Court noted that the co-defendants' hearsay statement inculpatng the petitioner was not admissible against him under traditional rules of evidence or any recognized exception to the hearsay rule. 391 US 128, n 3. Now, there is a statement against penal interest exception to the hearsay rule. MRE 804(b)(3)." *People v. Watkins*, 178 Mich App 439, 442-443 (1989).

Michigan Rule of Evidence 804(b)(3) states:

"Statement Against Interest. A statement which was at the time of its making so far contrary to *the declarant's* pecuniary or proprietary interest, or so far tended to subject *him* to civil or criminal liability, or to render invalid a claim *by him* against another, that a reasonable person in *his position* would not have made the statement unless *he* believed it to be true. A statement tending to expose *the declarant* to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement." (emphasis added)

Under this rule, defendant Jordan's statement can rightfully be used against him and defendant Miller's statement can rightfully be used against him. MRE 804(b)(3) does not stand for the proposition that these statements can be imputed to the other defendants. To hold otherwise, this Court would have to hold that MRE 804(b)(3) does away with the federal precedent set by *Bruton*, and its progeny and, more importantly, the Sixth Amendment right to confront one's accusers. In a confrontation between a rule of evidence and a consti-

tutionally protected right, the former must always yield to the latter; to hold otherwise is to allow a codified hearsay exception to assume constitutional stature.

In *Idaho v. Wright*, 497 U.S. __; 110 S Ct 3139; 111 L Ed 2d 638 (1990), the Court held that "particularized guarantees of trustworthiness must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." 111 L Ed 2d at 655.

The decision below rested on consistent precedent set by this Court and for these reasons, Respondent Hunter submits that the present case was properly decided by the Michigan Supreme Court, and does not present an important question of federal law which has not been, but should be settled by this Court. Respondent would respectfully pray that the Petition for a Writ of Certiorari filed by the People of the State of Michigan be denied.

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, plenary review should not be granted in this case and the Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan filed by the People of the State of Michigan should not be granted.

Respectfully submitted,

By: /s/ GERALD M. LORENCE

Counsel of Record

1750 Penobscot Building

Detroit, Michigan 48226

(313) 961-9055

Dated:

November 12, 1991

Attorney for Respondent Hunter

